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POLICY & RULES DIVISION

January 17, 1992

The Honorable Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RM-7984

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Dear Ms. Searcy:

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

On behalf of the National Infomercial Marketing Association (NIMA), I am submitting this letter to set forth the reasons why the Commission should deny the pending request to initiate a proceeding to consider amending its sponsorship identification rules insofar as they apply to program-length commercials.

In sum, we believe that petitioners have failed to show any basis for amendment of the Commission's rules. The Federal Trade Commission maintains a vigorous enforcement policy to prevent false or misleading statements in program-length advertising. The Commission properly has deferred to the FTC's primary jurisdiction in policing advertisements to prevent consumer deception. The petition does not contain any facts that would justify a change in Commission policy, but instead relies on stereotypical claims about viewer behavior that are inconsistent with the Commission's commercialization decision.

#### BACKGROUND

The petition alleges that compliance by infomercials with existing Commission regulations on sponsorship identification (47 C.F.R. §73.1212) is inadequate to carry out the purpose of Section 317 of the Communications Act (47 U.S.C. 317). The petition nominally seeks a declaratory order that Section 317

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requires continuous sponsorship identification for infomercials. But that provision commits to agency discretion questions about the appropriate degree of disclosure. Thus, the petition should be treated as a request to initiate a rulemaking.

As demonstrated below, the petition provides no reason why the Commission should change its rules. The existing allocation of responsibility between the Commission and the FTC is working effectively to prevent consumer deception in infomercials. Moreover, recent self-regulatory trends within the industry are reinforcing these important Federal efforts.

#### DISCUSSION

The Commission's policy on program-length advertisements was described in testimony before Congress in 1989. The Commission stated that its existing regulations for identification of sponsored material were sufficient to assure that the public was informed that it was watching a paid-for program-length commercial, as long as the program was not otherwise false or misleading.<sup>1/</sup> The Commission further stated that complaints concerning false, deceptive or misleading matter in program-length commercials are referred to the FTC for review.

Petitioners have pointed to nothing that has occurred in the past two and one-half years that should lead the Commission to reconsider its policy that the FTC should exercise primary jurisdiction over allegations of fraudulent or misleading program content. Indeed, there have been at least two significant developments that demonstrate that the current policy is working effectively and should not be reconsidered.

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<sup>1/</sup> Testimony of William H. Johnson, Deputy Chief, Mass Media Bureau, in Infomercials, Hearing before the Subcommittee on Exports, Tax Policy and Special Problems of the House Committee on Small Business, 101st Cong., 1st Sess. 36-37, 106 (May 2, 1989).

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-- First, the FTC has maintained an aggressive enforcement program to punish and deter false or misleading material in infomercials. In the past three years, the FTC has brought a number of enforcement actions to enjoin use of deceptive content in program-length advertisements. The FTC enforcement program explicitly includes review of infomercials for potential deceptive use of their format.<sup>2/</sup> Although the FTC has authority to issue general rules or enforcement guidance if these problems cannot be resolved on a case-by-case basis, the FTC has not found it necessary to exercise that authority.<sup>3/</sup>

In recent consent decrees, the FTC has fine tuned its remedial "fencing-in" authority to require that the particular infomercials involved carry sponsor identification at the beginning and end of the program and at each point before the consumer is directly solicited to call an (800) number or order by mail.<sup>4/</sup> The FTC has stated that it "believes the frequency and type of disclosure we have required is adequate" to cure problems in programs the FTC previously found deceptive.<sup>5/</sup> By contrast, the petition would routinely require a far greater level of identification for all infomercials, regardless of program content. Simply stated, petitioners disagree with the case-by-case approach the FTC has decided is appropriate. The Commission should reject petitioners' academic notion and continue to support the FTC's judgment.

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2/ Testimony of William MacLeod, Director, FTC Bureau of Consumer Protection, in Infomercials, supra, at 29. Testimony of Barry Cutler, Director, FTC Bureau of Consumer Protection, in Consumer Protection and Infomercial Advertising, Hearing before House Small Business Committee, 101st Cong., 2d Sess. 96-98 (May 18, 1990).

3/ Id. at 98-99.

4/ See, e.g., Twin Star Productions, Inc., 55 Fed. Reg. 17494 (April 25, 1990); Consumer Protection and Infomercial Advertising, supra, at 15, 97.

5/ Id. at 97.



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-- Second, the infomercial industry itself has taken self-regulatory action to make certain consumers are fully and fairly informed of the commercial nature of program-length advertisements. In early 1991, the NIMA published Marketing Guidelines for the infomercial industry. The Guidelines require that each infomercial "should be preceded and concluded with a clear and prominent written or oral announcement" that the program is a paid advertisement for a specific product. The Guidelines further require that a clear and prominent written or oral announcement "should also be made prior to each ordering opportunity that the program the viewer is watching is a paid advertisement" for the product involved. Finally, the Guidelines require that each infomercial include a clear and prominent written or oral announcement identifying the name of the party who sponsored, paid for or furnished the program. Most infomercials in use today are clearly labelled in accordance with this requirement.

These requirements insure that all viewers will be fully and fairly informed of the commercial nature and sponsor of the program. By requiring explicit identifiers at the critical moments of any infomercials when direct consumer orders are solicited, the Guidelines assure that viewers who dial into the program while it is running will be fully informed of the commercial nature of the program. NIMA's Marketing Guidelines have been widely distributed within the infomercial industry and to all broadcasters and cablecasters in the United States.

Thus, these two developments confirm the validity of the position taken by the Commission in 1989, that the existing policy is sufficient to inform consumers who is sponsoring the infomercial.

The petition ignores the rationale underlying the Commission's policy and attempts to minimize the significance of the FTC and industry efforts. It asserts that by their length, their format, and the nature of modern viewing habits, program-length commercials are inherently deceptive. (Pet. at 4-5, 13.) There are at least three principal reasons why the Commission should reject this claim.

-- First, the petition offers no evidence to support its contention. Rather, it relies on stereotypical assertions that viewers are unable to distinguish between infomercials and other programming; and that viewers are "conditioned" (Pet. at 5) and view television through lenses of "preconception" (Pet. at 5) and immutable "assumption" (Pet. at 3). Such

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unsubstantiated characterizations do not provide a basis for Commission action.

-- Second, the petition makes a threshold argument that all infomercials, by their format, are necessarily and inherently deceptive, regardless of their length, editorial content or the manner in which information is presented. On its face, the claim is too broad to be credible. For example, in testimony before Congress in 1989, the Director of the FTC Bureau of Consumer Protection stated that "there are clearly types of program-length advertisements whose formats are not deceptive." (Infomercials at 29). At the same time, the FTC recognized that in individual cases the format of an infomercial could be used to enhance the deceptiveness of the underlying claims and could be an appropriate subject for injunctive relief. The critical point is that the FTC has concluded that it is necessary to review concerns about particular infomercial formats on a case-by-case basis, contrary to the categorical position advocated by the petition.

-- Third, the petition implicitly challenges the evidentiary conclusions and policy underlying the Commission's 1984 decision on commercialization, and thereby seeks to reimpose significant and discriminatory limits on this particular form of commercial speech. The Commission has concluded that adult viewers can differentiate between commercial and other forms of programming and that consumer behavior ("dialing away") will determine the appropriate level of commercials on broadcast stations. Petitioners, however, would -- for purposes of infomercials alone -- treat adults in the same fashion as children are treated under traditional Commission policy. That is, special limitations on this form of commercial speech alone would be required, due to adult viewers' purported lack of commercial savvy with respect to infomercials and their alleged inability to distinguish conceptually between the commercial and informational aspects in a program-length show. See Action for Children's Televisions v. FCC, 821 F.2d 741, 743 (D.C. Cir. 1987). This assertion is fundamentally inconsistent with the basis for the commercialization policy, and would substantially "impede the ability of commercial television stations to present innovative and detailed commercials." Commercial TV Stations, 98 F.C.C.2d 1076, 1104 (1984).

Finally, the petitioners seek to make the broadcaster responsible for the content of a commercial program. The Commission's existing rules require the broadcaster (or cablecaster) to identify the sponsored nature of the program at

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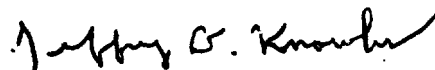
a point in the programming which the broadcaster can control: that is, at the beginning or end. This proposal would require the broadcaster to become an active participant in, and monitor of advertising content -- a requirement that the Commission has explicitly rejected as inconsistent with First Amendment concerns and the reality of the commercial marketplace. See Commercial Television Stations, *supra*, 98 F.C.C.2d at 1104. Petitioners have likewise presented no evidence to challenge the Commission's prior conclusions that broadcasters could be relied upon to exercise good judgment and should be treated like other media, with no additional requirements with respect to deceptive advertising. Limitation of Unnecessary Broadcast Regulation, 57 R.R.2d 913, 924 (1985).

Furthermore, if it granted the petition, the Commission could find itself on a slippery slope leading toward reimposition of limits on commercials in other formats. If unsubstantiated assertions about audience preconceptions and modern channel changing practices are sufficient to trigger fundamental reconsideration of Commission policies here, the Commission will thereby invite future challenges to other aspects of its deregulatory policies.

#### CONCLUSION

For these reasons, NIMA respectfully submits that the Commission should reject the petition and should not initiate a rulemaking to reconsider its sponsorship identification policy. If petitioners believe that the format of specific infomercials make them false or misleading, they should bring their complaints to the FTC for enforcement action. But their unfounded and simplistic assumptions about consumer behavior provide no basis for broadcast reregulation.

Sincerely,



Jeffrey D. Knowles

Counsel to National Infomercial  
Marketing Association

#### Enclosure

cc: Roy J. Stewart, Esq.  
Mr. Douglas Webbink  
David Horowitz, Esq.  
Angela J. Campbell, Esq.  
Jeffrey A. Bartos, Esq.